

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.195 OF 1997

In

NOTICE OF MOTION NO.1655 OF 1993

In

SUIT NO.2598 OF 1993

1. Mrs.Rajeshwari Sureshchandra Mittal

2. Rohit Sureshchandra Mittal

Both of Bombay Indian Inhabitants,

residing at 23, Raj Mahal,

4th floor, Sir, N.V. Road,

Andheri (East), Bombay-400 058.

: Appellants

(Orig.Plaintiffs)

V/s.

1. M/s.Mascot Developers

having office at 202, Kakad

Palace 31st Turner Road,

Bandra (West), Bombay-400 050.

2. Dr. Sharad Joshi

3. Yogen Joshi

4. Dr.Natwarlal Dayashankar Joshi

all No.2 to 4 of Bombay Indian

Inhabitants at 65, S.V. Road,

Irla Bridge, Andheri (West),

Bombay-400 058.

5. Mitul Convant Kakad of Bombay

Indian Inhabitant, residing

at Rajnigandha, Near Arya Samag,

Santacruz (West), Bombay-400 054.

6. M/s.Majithia & Mehta Construction

Pvt. Ltd., 306, Princes Street,

Bombay-400 002.

: Respondents

(Orig.Defendants)

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Mr.Ulhas Kerkar i/b. Mr.D.R.Shah for the appellants.

Mrs.A.R.Lambay i/b. M/s.Lambay & Co., for respondent nos.1 & 5.

Mr.Virag Tulzapurkar, senior counsel, with Ms Alpana Ghone i/b. M/s.Kanga & Co., for respondent no.6.

ĊÖRAM : R.M.LODHA & S.A.BOBDE, JJ.

DATE : NOVEMBER 30, 2006.

ORAL JUDGEMENT (Per R.M.Lodha, J.)

1. This appeal is directed against the order dated 20th December, 1996 passed by the learned Motion Judge whereby he dismissed the Notice of Motion taken out by the appellants (original plaintiffs) for grant of interim reliefs.

2. The appellants are the original plaintiffs. They filed the suit for specific performance of the contract

dated 19.10.1990 for sale of flat admeasuring 800 sq. ft. built up area on the 4th floor in the proposed building on the land bearing C.T.S. no.596, 596/1 to 13 of Vile Parle, plot no.68 of T.P. Scheme no.VI, Andheri (West), Mumbai, and other incidental reliefs. The agreement is admittedly between the plaintiffs and the 1st defendant--M/s.Mascot Developers. The defendant nos.2, 3 and 5 are partners of the defendant no.1 firm. The defendant no.4 is the original owner of the land bearing C.T.S. no.596, 596/1 to 13, Vile Parle, plot no.68 of Town Planning Scheme no.VI of Andheri, Mumbai. The defendant no.6 was initially M/s.Majithia & Mehta Construction Pvt. Ltd. and now having the name of Hatane Premises Private Ltd., which is said to have entered into an agreement for sale with regard to the said property with the defendant no.4--Dr. Natwarlal Dayashankar Joshi (owner).

3. The agreement between the plaintiffs and the defendant no.1 is in the form of letter and receipt, the execution whereof is not in dispute. For the sake of clarity, we deem it proper to reproduce the agreement as it is:-

"STAMP PAPER OF RS.10.00

From : M/s.MASCOT DEVELOPERS
202, Kakad Palace
31st Turner Road,

Bandra (West)
Bombay 400 050.

Date : 19.10.1990

To

Mrs.Rajeshwari S. Mittal and
Mr.Rohit S. Mittal
23 Raj Mahal, 4th floor,
Sir M.V.Road, Andheri (E)
Bombay 400 069.

Dear Sir,

Ref: Sale of Flat No.(facing) S.V. Road,
on 4th floor having built up area of
800 sq.ft. in our proposed building
in Joshi Estate, bearing Survey
No.CTS No.596 1 to 13) Village Vile
Parle T.P. No.68 & T.P.S. No.VI
Andheri (West) Bombay 400 058.

Please refer to the discussion we had with you
on the aforesaid subject. We confirm and put
on record the following agreement:

1. That we have agreed to sell you captioned
flat for a consideration of Rs.7,60,000.00 out
of which we have today received Rs.25,000.00 in
cash.
2. The balance consideration of Rs.7,35,000.00
shall be paid by you according to progress of
work as per provisions of law.
3. We undertake to give you possession of the
aforesaid flat on or before 31.01.1992 with a
grace period upto 31.03.1992. If the
possession of the flat for whatsoever reason is
not given by us to you on or before 31.03.1992
we shall pay you a sum equivalent to market
value of the similar flat in the said locality
as reduced by the balance similar flat in the
said locality as reduced by the balance amonst
(sic) payable as per clause 2 hereinbefore.
The market value of the flat shall be
determined by an Arbitrator appointed by each
party and provisions of Arbitration Act 1940
shall apply accordingly. Each party shall

nominate Arbitrator on or before 30.04.1992.

However, if we fail to nominate our Arbitrator then you may 15 days' notice to us to nominate the Arbitration. However, if we fail to nominate the Arbitration. (sic) However, if we fail to nominate the Arbitration, within 15 days of the said notice then in that case the Arbitrator nominated by you shall act as sole Arbitrator and his decision shall be binding on us.

4. Other terms and conditions shall be as per standard terms stipulated by Govt. of Maharashtra for such types of agreements.

Please confirm.

Yours faithfully,
for MASCOT DEVELOPERS

I Confirmed

Sd/-

Sd/-

Rajeshwari Mittal

(PARTNER)

RECEIPT

RECEIVED with thanks a sum of Rs.25,000.00 (Rupees Twenty five thousand only) in cash from Mrs. Rajeshwari S. Mittal and Mr. Rohit S. Mittal, Andheri (East), Bombay 400 069, on this 19th day of October, 1990, against sale of flat No. (facing S.V. Road) on 4th floor, having built up area of 800 sq. ft. in our proposed building in Joshi Estate, bearing Survey No. CTS No. 596 (596 1 to 13), Village Vile Parle T.P. No. 68 & T.P.S. No. VI Andheri (West), Bombay 400 058.

For MASCOT DEVELOPERS

Sd/-

(PARTNER)"

4. The plaintiffs' case is that in or about the year 1986, the 1st defendant announced a scheme for construction of a building consisting of ground plus six upper floors on the land afore-referred and started

booking flats in the proposed building. The 1st defendant represented to the 2nd plaintiff when he went to book the flat on the 4th floor of the proposed building in the month of October 1990 that the defendant no.4 (owner) had agreed to sell the said plot and given development rights to the 1st defendant and that the sons and/or relatives of the 4th defendant are partners of the 1st defendant firm. The 1st and the 4th defendant further represented to the 1st plaintiff that since the owners of the said land are connected with the development of the said land through the 1st defendant, there will be no problem to the flat purchasers. The 1st and the 4th defendants also represented to the 1st plaintiff at that time that the project involves demolition of existing building on the said land and it will take little more time to start the project and possession of the flats in proposed building will be given in or about 1992. Relying on the said representation of the defendant nos.1 and 4, the case of the plaintiffs is that, they agreed to purchase from the 1st defendant a flat of about 800 sq. ft. (built up area) on the 4th floor of the proposed building for a price of Rs.7,60,000/- of which a sum of Rs.25,000/- was paid by the plaintiffs to the 1st defendant firm as Earnest Money. The balance of Rs.7,35,000/- was payable as per the progress of work as recorded in the agreement

dated 19.10.1990. The possession of the said flat was to be given by the 1st defendant firm on or before 31.1.1992 with a grace period upto 31.3.1992. The plaintiffs further averred that the 2nd plaintiff approached the 1st defendant and the 4th defendant on different occasions in the beginning of January 1992 to ascertain the date on which the possession of the said flat would be given as the 1st defendant had not even started any work at all and the existing old building on the said land was also not demolished. Correspondence ensued between the parties and as nothing happened, the suit for specific performance was filed on 8.7.1993 seeking specific performance of the agreement dated 19.10.1990 and other incidental reliefs.

5. The plaintiffs also took out Notice of Motion for interim relief, inter alia, for appointment of the Court Receiver and temporary injunction. It appears that initially on 23.7.1993 ad-interim order was passed by the learned Motion Judge asking the defendant no.1 to reserve one flat for the plaintiffs. Upon appeal being preferred from the said order, on 18.8.1993, the ad-interim order was vacated by the appeal Bench. As already noticed above, the Notice of Motion was ultimately dismissed by the learned Motion Judge on 20.12.1996 giving rise to the present appeal.

6. In the reply affidavit in opposition to the Notice of Motion taken out by the plaintiffs, the defendant no.4 set up the case that he was the sole owner of the property and as the owner of the property, he was desirous of developing the same and, accordingly, entered into an agreement dated 8.7.1985 with M/s.Mascot Constructions. According to the defendant no.4, M/s.Mascot Constructions entered into a joint venture agreement with M/s.Mascot Developers (defendant no.1). The case of the defendant no.4 is that under the agreement entered into between him and M/s.Mascot Constructions, M/s.Mascot Constructions were obliged to carry out the obligation which they failed to do and, therefore, the agreement dated 8.7.1985 which he entered into with M/s.Mascot Constructions was terminated. Subsequently, M/s.Mascot Constructions terminated its contract with M/s.Mascot Developers. The defendant no.4, thus, set up the case that there is no privity of contract between the defendant no.1 (M/s.Mascot Developers) and him. It appears that M/s.Mascot Developers filed the suit before this Court against M/s.Mascot Constructions and the defendant no.4 herein challenging the cancellation of the agreement. The said suit No.3690 of 1992 is said to be pending. However, admittedly, no interim relief is operating in that suit. Subsequently, it appears that the original

owner entered into a contract with M/s.Majithia & Mehta Construction Pvt. Ltd. for development of the property and pursuant thereto, the property has been developed by M/s.Majithia & Mehta Construction Pvt. Ltd. (now Hitane Premises Private Ltd.

7. In the back drop of these facts, we have to see whether the learned Motion Judge committed any error in refusing to grant interim relief to the plaintiffs warranting interference by us.

8. The facts which have already noticed above would show that as a matter of fact, the agreement for sale dated 19.10.1992 for sale of the flat is between the plaintiffs and M/s.Mascot Developers (defendant no.1). These facts would further show that M/s.Mascot Developers have no direct contract of any sort whatsoever pertaining to the land in question with the owner of the land (defendant no.4). The owner had entered into development agreement with M/s.Mascot Constructions and M/s.Mascot Constructions had in turn entered into joint venture agreement with M/s.Mascot Developers. However, subsequently, the agreement which the owner had with M/s.Mascot Constructions was terminated and, consequently, M/s.Mascot Constructions terminated the contract with M/s.Mascot Developers. Thus, M/s.Mascot

Developers had no subsisting contract concerning the suit land with the owner though the suit in respect thereof is pending before the Court. There being no restraint order or injunction of any nature whatsoever, the owner has subsequently entered into an agreement with M/s.Majithia & Mehta Construction Pvt. Ltd. (now Hitane Premises Private Limited) -- defendant no.6 who are said to have developed the property. These facts have also been noticed by the learned Motion Judge for denial of interim relief in favour of the plaintiffs. We have no justifiable reason to take a different view.

9. Besides that, prima facie consideration of the matter by the learned Motion Judge that the agreement provides for damages in the event of non-performance of the contract by the 1st defendant and in view thereof also, prima facie case for specific performance of the contract is not made out cannot be said to be erroneous, justifying interference by us in the prima facie finding. A careful reading of the agreement, as reproduced by us above, would show that the defendant no.1--M/s.Mascot Developers agreed to sell a flat facing S.V. Road on 4th floor, having built up area of 800 sq. ft. in their proposed building for a consideration of Rs.7,60,000/- out of which, a sum of Rs.25,000/- was paid by the plaintiffs to the 1st defendant and the balance

consideration of Rs.7,35,000/- was to be paid according to the progress of the work. The 1st defendant undertook to give possession of the said flat on or before 31.1.1992 with a grace period upto 31.3.1992 and if the possession of the flat was not given by the expiry of the grace period, the defendant no.1 agreed to pay a sum equivalent to the market value of a similar flat in the said locality adjusting as reduced by the balance consideration as set out in clause 2 of the agreement. Though paragraph 3 of the agreement mentions about the possession of the flat, prima facie, it appears to us to refer to the sale of the flat as it provides for compensation calculated at the rate of the market value of the similar flat. Read thus, the learned Motion Judge cannot be said to have erred in observing that the agreement provides for compensation and, therefore, the plaintiffs are not entitled to the grant of a decree of specific performance. There is merit in this finding of the learned Motion Judge insofar as consideration of the matter for grant of interim relief was concerned. We thus find that the discretion exercised by the learned Motion Judge in refusing to grant interim relief is based on proper consideration of the matter at the prima facie stage and does not call for any interference in appeal.

10. Appeal is, accordingly, dismissed with no order as

to costs.

11. Looking to the controversy involved, we request the learned trial Judge to hear and decide the suit expeditiously.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.